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SUPREME COURT, U.S.

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Supreme Court of the United States

October Term, A. D. 1969

No. 971

ALBERT C. DROSTE,

Appellant,

vs.

OTTO KERNER, Governor of the State of Illinois, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and JAMES B. CARROLL, WILLIAM J. McCARTHY, JAMES M. ARGYRIS, JOHN LEVEN and ROBERT J. [illegible], Commissioners of the Chicago Park District, constituting all members and officers of the BOARD OF [illegible],

Appellees.

INDEX.

	PAGE
Motion to Dismiss	1
I. This appeal raises no significant federal question	2
A. The Question of the Interpretation and application of the Public Trust Doctrine is a question of State law	2
B. Appellant's contentions of a denial of due process of law and equal protection of the law raise no substantial federal question	4
II. Plaintiff has no standing to present this appeal	11
Conclusion	12

AUTHORITIES CITED.

Illinois Central Railroad Co. v. People of the State of Illinois, 146 U. S. 387	2
People of State of New York v. Zimmerman, 278 U. S. 63	5
Bowe v. Scott, 233 U. S. 658	5
Hanson v. Denckla, 357 U. S. 235	6
Anderson National Bank v. Luckett, 321 U. S. 281	9
Hickey v. Illinois Central Railroad, —— Ill. 2d ——	10
Frothingham v. Mellon, 262 U. S. 447	11

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ALBERT C. DROSTE,

Appellant,

vs.

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,

Appellees.

(On Appeal from the Supreme Court of Illinois.)

MOTION TO DISMISS

Otto Kerner, Governor of the State of Illinois, and Paul Powell, Secretary of State of Illinois, appellees herein, by William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16 1(b) of the Revised Rules of the Supreme Court of the United States, move to dismiss this appeal on the grounds that it does not present a substantial federal question, and that appellant lacks the requisite standing to support this appeal.

ARGUMENT

I.

THIS APPEAL RAISES NO SIGNIFICANT FEDERAL QUESTION.

The instant case was appealed to this Court on the basis that an act of the Illinois General Assembly conveying certain submerged land under Lake Michigan to the United States Steel Corporation was attacked by appellant in the Illinois courts and upheld by the Illinois Supreme Court against an allegation of its invalidity based on federal grounds. In this point it will be shown that the questions presented to the Illinois Supreme Court were, in essence, questions of state law and that no substantial federal question is presented by this appeal.

A.

THE QUESTION OF THE INTERPRETATION AND APPLICATION OF THE PUBLIC TRUST DOCTRINE IS A QUESTION OF STATE LAW.

Appellant contends that because the origin of the public trust doctrine in Illinois lies in the decision of this Court in *Illinois Central Railroad Co.* v. *People of the State of Illinois,* 146 U.S. 387, the interpretation of that doctrine is a federal question. This contention completely overlooks the fact that this Court has held that the question is one of state law. The case relied on by appellant reached this Court on the basis of a Contract Clause contention and not on the basis that the public trust doctrine involved any federal question. In a subsequent decision by

this Court in that case, *Illinois Central Railroad Co.* v. *Chicago,* 176 U.S. 646, the issue of whether the application of the public trust raised any federal question was completely answered in the negative. There this Court said at 176 U. S. p. 659:

> "Under the law of the State of Illinois, as laid down by the Supreme Court, not only in the case under consideration, but in the prior case of *People* v. *Kirk,* 162 Illinois, 138, 146, 'the State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people, for the purposes of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds the title in trust in its sovereign capacity, for the people of the entire State.' Such was also the ruling of this court in a case between the same parties, *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, affirming *Illinois* v. *Illinois Central Railroad,* 33 Fed. Rep. 730. This, too, is a question of local law with regard to which the decisions of the state courts are conclusive. *Packer* v. *Bird,* 137 U. S. 661; *Hardin* v. *Jordan,* 140 U. S. 371."

Thus the public trust doctrine raises no federal question, and appellant's attempt to invoke the jurisdiction of this Court on that basis is invalid.

It is also equally clear that the requirements of the public trust doctrine were properly applied by the Illinois Supreme Court.

In the original *Lake Front* case, *Illinois Central Railroad* v. *Illinois,* 146 U. S. 387, this Court stated that the submerged lands under the Great Lakes are governed by the same rule as governs tidewater lands, and that rule is such lands are owned by the states in which they are located and that state may use or dispose of any portion when it "can be done without substantial impairment of

the interest of the public in the waters and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States." 146 U. S. at p. 435.

Here there was clearly no interference with the Congressional right to control navigation. In this regard it is relevant to note that before the land can be filled in there must be approval from the Corps of Engineers. Likewise the interest of the public in the waters has not been substantially impaired. The land in question is in a commercial area, and the Legislature believed that the interest of the citizens would be better served by an expansion of industry in this location. It is significant that U. S. Steel had no other place to expand its existing Illinois plant and the new proposed plant might have been lost to Illinois if this land were not made available. There was no violation of the public trust doctrine.

B.

APPELLANT'S CONTENTIONS OF A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW RAISE NO SUBSTANTIAL FEDERAL QUESTIONS.

It is contended by appellant that the decision of the Illinois Supreme Court in this case constitutes a denial of Due Process and Equal Protection. However, this contention was never properly raised in the Illinois courts and is, therefore, not within the scope of review by this Court. Also if it were to be considered, it is clearly invalid.

In the trial court, the only allegation of appellant's complaints which is in any way relevant to this conten-

tion is the allegation in the amended complaint in the common law action that the proposed conveyance is "invalid, unauthorized, and void under the constitutions, statutes, and laws of the United States and of the State of Illinois . . ." (Abstract [No. 38905] p. 3). This contention, which did not state which provision of federal law was alleged to be violated or the manner in which it was alleged to be violated, did not raise any real federal question.

As this Court said in *People of State of New York* v. *Zimmerman,* 278 U. S. 63 at pages 67-68:

> "With these general rules in mind we turn to what is shown in this case. The petition for habeas corpus, while asserting that the state statute was 'unconstitutional', contained no mention of any constitutional provision, state or federal. The opinion delivered by the court of first instance was similarly indefinite. Up to that point it is left uncertain whether the claim of invalidity was grounded on some provision of the state Constitution, or on some provision of the Constitution of the United States, or on both. If this were all, there plainly would be no basis for a review in this court."

In the Illinois Supreme Court, no question of any violation of the Due Process or Equal Protection Clauses of the Federal Constitution was included in appellant's brief except for a general statement that there was a violation of the Fourteenth Amendment. Under Illinois Supreme Court Rule 39, because this point was not argued, it was waived. The only time such a question was directly raised by appellant was in a point in his Petition for Rehearing from the final decision in which he states that the plaintiff and other citizens were equitable owners of the submerged land and by the conveyance this property right was "denied".

As this Court said in *Bowe* v. *Scott,* 233 U. S. 658 at p. 663:

> "As it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction."

A later decision of this Court again declaring that the raising of a federal question in a petition for rehearing is too late is *Hanson* v. *Denckla,* 357 U. S. 235.

Here it can not be contended that the allegation in the petition for rehearing was passed on by the Court when it was made after the final opinion had been issued and that opinion was never modified thereafter.

The Illinois Supreme Court did state in its opinion in this case that it had considered constitutional objections to the conveyance. The Court said:

> "The plaintiff suggests other constitutional grounds of attack on the statute in question, such as insufficiency of its title and violation of due process. We have carefully examined them and find them to be without merit. The trial court determined that under the constitution and laws of Illinois, including section 22 of article IV of the Illinois constitution, the legislature had the power to pass the legislation in question and that the act of June 26, 1963, is valid. We conclude that this determination of the trial court is correct." (Appendix to Jurisdictional Statement, p. 6a)

From the context in which this statement was made it is clear that the Illinois Supreme Court was considering objections under the Illinois Constitution which were raised

in appellant's briefs, not objections under the Federal Constitution which were not. This is shown from the statement of the Illinois Supreme Court that it concludes the determination of the trial court that "under the constitution and laws of Illinois . . . the legislature had the power to pass the legislation in question . . ." is correct.

Thus since these questions were not properly presented at trial, and especially so because they were not presented to or ruled upon by the Illinois Supreme Court, this Court lacks jurisdiction to consider them here. However, even if the allegations of lack of Due Process and Equal Protection under the Federal Constitution were to be considered, these protections were not violated.

In order to properly establish that Due Process and Equal Protection were not violated by the conveyance in question it is necessary to separate appellant's contention on this point into three different allegations:

1) *First,* appellant contends that since under the public trust doctrine this land was held in trust for the public, the conveyance of the property by the Illinois Legislature to another is a taking of his property without Due Process.
2) *Second,* appellant contends that to convey the property to one citizen and not all is a violation of Equal Protection.
3) *Finally,* appellant contends that to deny his suit on the basis that a citizen lacks standing to attack a conveyance of state lands where a citizen can attack an expenditure of public monies is a violation of Equal Protection especially where the Attorney General, on request, will not attack the conveyance.

These contentions are invalid. The first contention alleging a violation of Due Process must be predicated

on the basis that the requirements of the public trust doctrine were violated by the conveyance in question. If the argument were not so predicated it would mean that every conveyance of submerged land by the state would be a violation of Due Process. Since this is obviously not true, it appears to be appellant's belief that only a conveyance which violates the public trust doctrine is a violation of Due Process. There are many valid answers to that contention. Among them are the fact that as previously established, the conveyance in question was not in conflict with the public trust doctrine; the fact that the Legislature which is the principal guardian of the public trust deemed the conveyance to be for the benefit of all the citizens; the fact that, since the interpretation of the public trust doctrine is not a federal question, as previously established, a violation of its proper interpretation, even if present, cannot be a violation of Due Process; and the fact that while the submerged land is held by the state for the citizens in general, no individual has a property right in that property which could be protected by Due Process.

Appellant's second point, that conveying the land to one citizen rather than another is a violation of Equal Protection is equally invalid. Again a conveyance of state land, submerged or otherwise, must necessarily run in favor of some person or institution. This is not a violation of Equal Protection where the Legislature believes it is in the public interest for the grantee to have this land even if no consideration is paid for it. The land grants to railroads in the early history of our nation establish that point. Here, of course, there was consideration paid for the land. Clearly it is not a violation of Equal Protection to sell state lands to a private individual or corporation. Admittedly the consideration was not large,

$19,460. But it was deemed fair by the Legislature in light of the public interest in having a new steel plant at that location, and the admittedly large expenditures which would be necessary to reclaim this submerged land. Even absent those factors, however, a sum of almost $20,000 cannot be considered merely nominal. No valid violation of Equal Protection is established by this contention.

Finally, appellant asserts that to deny him standing to contest the conveyance of public land while allowing a citizen to contest an expenditure of public funds is a violation of Due Process. The best answer to this contention lies in the fact that both the trial court and the Illinois Supreme Court ruled on his contentions on the merits. True, the Illinois Supreme Court as an alternative basis for its decision held that the appellant or a person in his position has no standing to challenge a conveyance of state land, but this was in addition to its holding on the merits. Since this rule was not applied to prevent appellant from obtaining a ruling on the merits, he clearly has no standing to challenge it. No one has standing to attack a statute or decision unless he is adversely affected by it. "In the absence of a showing of injury, actual or threatened there can be no constitutional argument" (*Anderson National Bank* v. *Luckett*, 321 U. S. 281 at p. 242.)

On a broader level, even if this ruling or standing had been applied to appellant's detriment, it would not have resulted in a denial of Equal Protection. In essence, appellant's contention is that it is a denial of Equal Protection to allow a citizen to attack the expenditure of state funds but not the conveyance of state lands. This contention is invalid on its face because no discrimination occurs; everyone is treated equally. If any citizen wishes to contest a state expenditure he may do so; no citizen can

contest a conveyance of state lands unless he shows special damage. Since everyone is treated equally, there is no discrimination and no violation of Equal Protection. A real distinction is present between how a state spends its money and how it disposes of its property. Money is an asset which is always of value to a state and its citizens. Land may be excess and of no value to the state or its citizens except for the money which can be obtained in exchange for it. To allow a citizen to attack any state conveyance on the ground the state did not obtain the best possible price for it would open the doors of the courts to questions which are really incapable of judicial determination, and are best left to the discretion of the state legislative body.

Appellant also states that this issue is more grave because the Attorney General of Illinois, the only party who in the absence of special injury can attack a state conveyance and who is specially in charge of submerged lands under the public trust doctrine refused to bring this suit on request.

While the duties of the Attorney General of Illinois are many and varied, it is significant to note that among them are the defense of state officials sued in their official capacity and the defense of state legislation which he deems valid. For both reasons he defended the instant suit.

This does not mean he does not take action to protect the submerged lands of the state where he deems the public trust doctrine has been violated. Indeed, he recently attempted to assert this doctrine for recovery of air rights over submerged lands where he believed they had never been properly conveyed by the Legislature in *Hickey* v. *Illinois Central Railroad* —— Ill. 2d——. But merely because requested by one citizen he is under no obliga-

tion to attack a conveyance of state lands he believes valid under the public trust doctrine. His discretion in this matter cannot be controlled, and must not be controlled, by individual citizens.

Since the appellant states no substantial federal question, this appeal should be dismissed.

II.

PLAINTIFF HAS NO STANDING TO PRESENT THIS APPEAL.

The Illinois Supreme Court as an alternative basis for its decision held that the plaintiff has no standing to present this appeal. This holding should be conclusive in this Court.

It is, of course, true that whether a state supreme court correctly holds on the question of standing to present a federal question is a question of federal law which this Court can reconsider on appeal.

It has long been the federal rule that a person who is adversely affected has standing to contest the validity of a state law, and if a state court denies that right this Court is not bound by that determination.

In the instant case, the appellant is not adversely affected except as a citizen and taxpayer. The federal rule is long established that a taxpayer has no standing to contest the expenditure of federal funds. *Frothingham* v. *Mellon,* 262 U. S. 447.

Illinois adopts a more liberal policy and allows a citizen to attack an expenditure of state funds but not a conveyance of state lands unless he can show a special injury. Because this is more liberal than the federal rule, it should

here control in light of the fact that it is not unconstitutional as previously established in this brief.

Thus since under both the federal and the Illinois rule appellant has no standing to bring this appeal, it should be dismissed.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the instant appeal should be dismissed for failure to state a substantial federal question, and treating the appeal as a petition for a writ of *certiorari, certiorari* should be denied on the same basis.

Respectfully submitted,

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